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Lawyers and Great Expectations in Pakistan

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“Great Expectations”

“I was too cowardly,” Phillip Pirrip, the protagonist in *Great Expectations* remorsefully wrote, “to do what I knew to be right, as I had been too cowardly to avoid doing what I knew to be wrong.” In the fluid political landscape of Pakistan, Pirrip’s remorse about rectitude and courage are more relevant than ever before.

More than five decades ago, the judiciary’s cowardice, many people said, paved the way for military regimes in Pakistan (vide the *Tamizuddin* decision). By a curious turn of fate, General Musharraf now blames the judiciary’s “courage” for thrusting Emergency on the people of Pakistan. In his speech to the nation explaining the imposition of Emergency, General Musharraf held the SC largely responsible for the current state of affairs.

So what precisely were the charges against the SC? General Musharraf made three points: (a) some members of the judiciary, he said, were “working at cross purposes with the executive and legislature in the fight against terrorism” (b) secondly, that the judiciary was “constantly interfering in executive functions,” and finally (c) that some members of the judiciary were routinely “humiliating government officials during court proceedings.”

A closer look at the activities of the SC in the last six months or so suggests that the Court was broadly dealing with two different kinds of matter. On one hand, there were the “big ticket” items: reinstatement of the (former) CJP, the Nawaz Sharif petition, eligibility of the General to contest (I) and the still pending constitutionality of the NRO. Given the stakes, “big ticket” items necessarily raise a lot of heat and dust and draw wide attention. More importantly, such items often have far-reaching consequences for the polity.

On the other hand, there were “micro matters” that involved a great deal of close monitoring of issues on the ground, issues that affect the lives of everyday people. Some examples of the “micro matters” include *suo moto* petitions concerning price rise, contempt petitions against police officials for their violence against lawyers and journalists, petition concerning the administration of Lal Masjid, petitions concerning the rights of missing persons, petitions concerning the investigations into the recent suicide attack and so on.

Note that almost all of the General’s allegations against “some members” of the SC were *only* about the micro matters. The reality, however, may be quite to the contrary. It may not be too outlandish to suggest that the General’s concerns were really about the big ticket items. After all, any decision making him ineligible to concurrently hold the post of the President would have severely cornered him.

For the SC, both the big ticket items and the micro matters raised different kinds of concerns. The big ticket items, in particular, created a peculiar paradox. Lawyers, journalists and commentators (almost across the board) wanted the SC to decide the matters only on the basis of law. But they also wanted the Court to decide it *their* way.

In other words, for the lawyers, the right answer was what *they* said it was. How else does one explain the bizarre public demonstrations by the lawyers and journalists against the SC for its refusal to entertain a petition against the eligibility of General Musharraf? The same lawyers and journalists who congratulated the SC for reinstating the (former) CJP turned against it when it rejected a petition against General Musharraf.

The micro matters, on the other hand, raised different concerns. Some of these micro matters were of the Court's own making but many were not. It needed the SC to confront government officials on a regular basis, both for their illegalities and inefficiencies. But for the confrontation to produce results, it also needed officials who were willing to abide by judicial decisions. Could that be achieved? Given the history of five decades, may be the SC overestimated the strength of its judgment in the face of a belligerent administration.

So what was the net effect of both processes? To put it in short, both the big ticket items and the micro matters put a disproportionate burden on the SC. Lawyers and journalists expected too much from the Court in too little time. Like the administration, they too were belligerent. And boxed from both sides, the SC, not surprisingly, found itself in a tight corner. Consequently, the resolute defiance of the (former) CJP that triggered a process of democratic revival, in less than six months, lies in ruins.

General Musharraf, in his speech to the nation, blamed the judiciary for the current state of affairs. Somewhat surprisingly, the *Daily Times* editorial expressed sympathy for the General: "There is no doubt that there was 'judicial activism' in the country not normally seen in third world states where institutions often malfunction." It went on: "The apex court underwent a radical and extremist transformation that, as it turns out, has harmed rather than helped Pakistan ... A *suo motu* judiciary went after the 'missing' people cases with a vengeance, regardless of the nature of the terrorist charges against them, threatening the civil servants with punishments, and indirectly causing them to lose initiative in the pursuit of their duties." To hold the judiciary responsible for the Emergency, as the DT editorial impliedly did, is to be highly irresponsible.

This Emergency is the direct result of the Pakistani intelligentsia's self-defeating *obsession* with "right" and "wrong" answers. In insisting on their brand of right answers, the lawyers with borrowed enthusiasm from journalists and commentators have created a situation that further distances them from their ultimate end. Their intentions may have been noble; its consequences are hardly so.

In conclusion, two points are worth highlighting. First, the events of the last six months must make one wonder about the viability of achieving democracy through "judicial politics." Any judicial process has structural limitations: it can aid, may be even abet but cannot (in the long run) sustain democratic institutions by itself. Secondly, constitutional litigation is like war: victory depends on a good strategy; not "right" and "wrong" answers. The challenge for Pakistan is to figure out a war strategy that will deliver its "Great Expectations."